In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 439

HERLONG SIERRA HOMES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was instituted by the United States to foreclose a deed of trust executed by petitioner in favor of the Manufacturers Trust Company of New York. The deed of trust was given to secure a $1,113,700 loan to petitioner "for the purpose of financing the construction of a rental housing project for military and civilian personnel at Sierra Ordnance Depot," Lassen County, California (Pet. App. B 3a). "Negotiations leading to the financing of [petitioner's] project were made pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. 1702), and of the Act of August 8, 1949, known as the Wherry Act (Title 12 U.S.C. 1748 *et seq.*)" (Pet. App. B 3a). The Wherry Act was substantially modified by the Capehart Act in 1955

284-490—66

(Act of Aug. 11, 1955, ch. 783, Title IV, § 401, 69 Stat. 646, 650.) However, construction of military housing under those two Acts has ended owing to the absence of necessary implementing legislation.

The Wherry Act created a Military Housing Insurance Fund for the use of the Federal Housing Commissioner "to assist in relieving the acute shortage * * * [of] housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations * * *" 12 U.S.C. 1748b. The Act authorizes the Commissioner "upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon" *Ibid.*

Pursuant to that Act, the Department of Defense filed a certification with the FHA as to the need for the construction of rental housing units in the vicinity of the Sierra Ordnance Depot. Thereafter, the Manufacturers Trust Company obtained an insurance commitment from the FHA and subsequently, with the approval of the Commissioner, granted a loan to petitioner. Following petitioner's default, Manufacturers Trust assigned the note and deed of trust to the FHA and this foreclosure proceeding was instituted.

By way of defense petitioner contended that its default was excusable because agents of the United

States had wrongfully prevented it from fulfilling its obligation under the loan. Alternatively, petitioner argued that the recovery of a deficiency judgment was barred by California law. The district court rejected both of these contentions. As to the former, it considered in detail the challenged acts of the government agents but "found nothing wrongful" (Pet. App. B 5a). As to the latter, it concluded that federal law, not state law, governed, and that under federal law a deficiency judgment could appropriately be entered following the foreclosure sale (Pet. App. B 8a). The court of appeals affirmed *per curiam* (Pet. App. A, 1a–2a).

1. Petitioner's contention that it should be excused from its default is bottomed on the assertion that the commanding officer of the Sierra Ordnance Depot and officials of the FHA were guilty of bad faith in actions they took which allegedly frustrated petitioner's ability to meet its loan obligation.[1] Thus it is suggested that the United States is estopped because the base commander, Colonel Leavitt, discouraged military and civilian personnel from occuping petitioner's units by disclosing construction deficiencies. The district court found that "Colonel Leavitt's actions were motivated, in this case, by his feeling that there were certain structural deficiencies in the buildings. The Court is satisfied from the evidence adduced on this matter that Colonel Leavitt's actions were justified by actual deficiencies in the construction of [petitioner's]

[1] Those acts formed the basis of a prior unsuccessful endeavor to secure a Federal Tort Claims Act recovery. See *Builders Corporation of America* v. *United States*, 320 F. 2d 425 (C.A. 9), certiorari denied, 376 U.S. 906.

buildings. Hence, [petitioner] was not relieved of its duty to perform by plaintiff's actions" (Pet. App. B 6a). Similarly, petitioner urged below that it was relieved of its duty under the mortgage because Colonel Leavitt required some 12 members of his staff to live in government owned housing. But the trial court found that "This action of Col. Leavitt was taken because he wanted these employees to be available to him by telephone at all times, and telephones were not available to them in Title VIII units. This action by Col. Leavitt was entirely proper. Additionally, there is no evidence that more than two of the twelve employees would have occupied Title VIII housing had such orders not been given" (Findings of Fact, No. 10).

With regard to the officials of FHA, petitioner alleged that they had enticed tenants away from its development by lowering rentals at a neighboring project. The district court found that this allegation "is simply not borne out by the record. FHA reduced the rents on the Title IX units sometime after April 20, 1956. The record shows that the occupancy of the [petitioner's] units had dropped steadily in the ninth [*sic*] month period immediately preceding FHA's decision to lower the rents on the Title IX units. [Petitioner] has introduced no evidence to indicate that the drop during the period from April, 1956, to August 1956, was not a continuation of the decline which was occurring long before Title IX rents were reduced. Furthermore, there is no showing that those tenants leaving [petitioner's] project moved into the Title IX units" (Pet. App. B 4a).

Thus, in asking this Court to review the refusal of both courts below to excuse its default, petitioner predicates his argument on a factual assertion that he failed to establish. Furthermore, nothing in the legislative history of the Wherry Act, cited by petitioner (Pet. 9–10), suggests that Congress sought to relieve home builders of the risks inherent in the construction of rental housing at military installations. Quite plainly the purpose of providing federal mortgage insurance was to facilitate mortgage financing notwithstanding those risks.

2. Petitioner's principal contention is that the courts below erred in indicating that federal law, rather than state law, was controlling on the question of whether a deficiency judgment could be entered following a foreclosure sale. That question does not merit further review since only the foreclosure order was properly before the court of appeals. Indeed, although the district court opinion contemplated the entry of a deficiency judgment, the foreclosure did not occur and the deficiency judgment was not entered until after the court of appeals rendered its decision. Petitioner noted an appeal from the deficiency judgment on July 8, 1966.

In any event, federal law does control. In an endeavor to bring itself within the ambit of this Court's decision in *United States* v. *Yazell,* 382 U.S. 341, petitioner argues that "[h]ere, all three parties and their counsel carefully worked out the terms of a loan in excess of a million dollars and all agreed that California

law should apply in all respects * * * " (Pet., p. 6).[2] But in point of fact the revelant documents do not support that suggestion. To be sure, the mortgage note does state that it "is to be construed" in accordance with the law of California. But that general reference to State law does not purport to bear on the question of the propriety of a deficiency judgment. That reference resolves conflicts between private parties as to the choice of the applicable State law in areas where State law may properly be applied. Here the note was executed by a Nevada corporation, in favor of a New York bank and was secured by California property. Unless the private parties agreed on the State whose law was to govern (in situations where State law applies) serious conflict problems could result. But whether or not the United States is entitled to a deficiency judgment when the proceeds of a foreclosure sale are insufficient to satisfy a debt owed the federal treasury certainly is not the kind of question that should be subjected to the vagaries of divergent State law. See *Clearfield Trust Co.* v. *United States,* 318 U.S. 363. The United States has consistently been held entitled to the advantages of federal law in federally insured housing loans, including deficiency judgments in States which have statutes barring such judgments. *E.g., United States* v. *Shimer,* 367 U.S. 374; *McKnight* v. *United States,*

[2] The applicability of *Yazell* was not argued before the Ninth Circuit (Pet. 6). We assume that in their pending appeal from the deficiency judgment petitioner will make the argument which it is endeavoring to assert for the first time to this Court.

259 F. 2d 540 (C.A. 9); *United States* v. *View Crest Garden Apts.*, 268 F. 2d 380 (C.A. 9); *United States* v. *Helz*, 314 F. 2d 301 (C.A. 6). In *Yazell*, of course, the Court was concerned with a Small Business Administration loan which "was individually negotiated in painfully particularized detail * * * with specific reference to Texas law" (382 U.S. at 345–346). As the Court noted, the FHA, in contrast to the SBA, "issues separate forms for each State but does not negotiate with individual applicants" (382 U.S. at 348, fn. 15).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

OCTOBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966